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No. 483

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

NATIONAL SURETY CORPORATION and
UNION TRUST COMPANY,
ST. PETERSBURG, FLORIDA,
Petitioners,

vs.

UNITED STATES OF AMERICA
FOR THE USE AND BENEFIT OF
LLEWELLYN MACHINERY COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

APPEARANCE OF COUNSEL FOR RESPONDENTS

Comes now THOMAS H. WAKEFIELD and makes his appearance before the Supreme Court of the United

States for and on behalf of the Respondent, Llewellyn Machinery Company.

THOMAS H. WAKEFIELD

QUESTION PRESENTED

Should the Supreme Court of the United States Grant a Miller Act Surety Company's Petition for Writ of Certiorari from an Order of a United States Court of Appeal Holding That the Said Surety Company is Bound by the Terms of His Principal's Contract To Pay a Materialman for Loss or Damage to Construction Equipment Rented for Use in a Miller Act Project?

Statement of the Case

To enlarge somewhat on the facts as presented in the paragraph of the Petitioners concise statement of the case (Page 7 of Petition), the Contractor, Thompson Contracting Company, Inc., rented certain equipment from Llewellyn Machinery Company, the Respondent herein, and agreed to "assume all responsibility for damage or loss" to the said equipment (R-25-45), as well as agreeing to pay a stated monthly rental. The equipment had been delivered to the Contractor and placed entirely in its custody and control, and the Materialman-Lessor had completely relinquished possession of the equipment prior to its loss. (R-47)

Except to point out the irrelevancy of the facts as elaborately stated in the second paragraph of the Petitioner's concise statement of the case (Page 7 and 8 of

Petition"; we have no other objections to the facts as presented therein. The significance of any subsequent agreement of the Contractor and Lessor is clearly not before the Court at this time. The Order of the United States District Court for the Southern District of Florida further confirms the irrelevancy of said agreement by concisely stating that the claim did not come "within the purview of the Miller Act" (R-50). The only significance of such a presentation of facts is possibly to demonstrate to this Court that the decision below was not a final determination of the case at bar, since the matter has been remanded to the said District Court for further proceedings and a trial on the merits.

ARGUMENT

It has been suggested that the Court of Appeals for the Fifth Circuit has decided an important question of Federal law which has not been, but which should be decided by this Court. That Court has held only that a Miller Act surety is bound by its principal's promise to pay for "loss or damage" to leased equipment while in the possession of the principal (Miller Act Contractor) for use on a work project of the United States.

We respectfully submit that such a holding, based on the peculiar facts before the Court below, have been long since at least impliedly accepted by this Honorable Court. In **Fidelity and Deposit Co. v. United States for the use of Smoot, 187 US 315, 23 S.Ct. 120, 47 L.Ed. 194**, this Court affirmed an opinion of a lower court (20 App. D.C. 376) which held,

" . . . Having voluntarily entered into the obli-

> gation, he (the surety) takes it with its burdens, one of which is that he is charged with the knowledge of his principal."

Thus it is clear that the surety was charged with knowledge of the terms of the contract provisions as well as the risk involved in this particular work project. There are no cases decided which would even remotely suggest that in the situation presented in the case at bar, the respondents should not be entitled to recovery. To the contrary, the language of the **Miller Act, 49 STAT. 793 (1935), 10 USC 270 a-d (1952)** affirms that those persons supplying materials for United States projects are to be "paid in full".

The plain meaning of such language contemplates payment for "loss or damage" to equipment when so promised by a contractor as payment for the use of the equipment. When "construed liberally" in accordance with this court's decision in **Illinois Surety Company v. John Davis Co., 244 US 376 (1917)** there can be no doubt that the purpose of the Miller Act is to insure payment to such materialmen as the Respondents herein who were induced by the principal to lease equipment for use in a project of the United States. To cast dispersion on this Court's ruling providing for a liberal construction of the Miller Act to effectuate the intent of Congress, by referring to it as an "overused cliche", does not lessen the effect of that decision.

Although the facts of this case are perhaps unusual in that the contractor promised to pay for loss or damage to leased equipment in consideration for its use, and the equipment was transported over the high seas subjecting

it to extraordinary risks which caused its loss, the decision is merely an application of settled law to an ordinary business situation.

The decision by the Court of Appeals in this instance is not nearly as far reaching as the decision in **Massachusetts Bonding Ins. Co. v. United States for the use of Clarksdale Machinery Co.**, 88 F.2d 388 (5th Cir. 1937) where costs of repair to leased trucks far in excess of the value of the trucks themselves were allowed because of the peculiar nature of the work which required the repairs to be made rather than allowing the trucks to be replaced. Had the equipment, in this instance, been repaired (salvaged from the bottom of the sea) the cost would have exceeded its value, and the situation would have been similar to that in the **Massachusetts Bonding Ins. Co. Case, supra.** However, in the case at bar, it was not necessary to retrieve the equipment so that only its fair value (the lesser amount) was allowed here.

The decision of the Court below is certainly not only in accord with the **Massachusetts Bonding Ins. Co. Case,** supra, but it is also in accord with the decision of the Court of Appeals for the Fourth Circuit, **United States for the use of Norfolk So. Ry. v. Taylor, 268 F. 635 (1920). Affirmed 277 F. 945 (Fourth Cir. 1921)** where cost of extensive repairs to leased barges were allowed because the contractor had promised to make said repairs. The Court there only enforced the terms of the rental contract, which is all that was done by the court below in this case.

The decision clearly does not contemplate that a surety is liable for "the replacement value" of material purchased by a contractor, but is limited to those cases

where damage or loss to "leased" equipment occurs when in the possession of a contractor for use on a Miller Act project, **and** the contractor has promised to pay for such loss or damage as consideration for the use of equipment. It is not suggested that such an agreement is unconscionable.

CONCLUSION

We respectfully assert that there is no reason for this Honorable Court to accept jurisdiction of this case in accordance with the Petition for Writ of Certiorari, since the decision of the Court below is in accord with a previous decision of that court as well as the decision of another circuit. Further, there are no cases decided in any way contrary to the decision below.

In addition, although the factual situation in this instance is perhaps unusual, this Court has repeatedly affirmed the doctrines upon which the lower court's decision is based. Certainly there are no cases decided by this Court which would suggest any other result than that reached by the Court of Appeals for the Fifth Circuit, and in fact the decision below is consistent with the Miller Act as interpreted on numerous occasions by this Court. To have disallowed the claim would have amounted to a gross conflict with the wording of the Miller Act as well as the decisions of this Court.

Therefore, we respectfully move that the Petition for Writ of Certiorari be quashed and dismissed and the cause be allowed to proceed in the United States District Court for the Southern District of Florida, in accordance

with the mandate of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

THOMAS H. WAKEFIELD,
Attorney for Respondent,
Llewellyn Machinery Company
609 Ainsley Building
Miami 32, Florida

IT IS HEREBY CERTIFIED that copy of the foregoing Respondent's Brief in Opposition for Writ of Certiorari to United States Court of Appeals for the Fifth Circuit was mailed to Mr. Walter Humkey, Attorney for Petitioner, National Surety Corporation, 401 Industrial National Bank Building, Miami, Florida, and to Mr. Frank M. Harris, Attorney for Petitioner, Union Trust Company, 428 First Federal Building, St. Petersburg, Florida, this 5th day of November, 1959.

THOMAS H. WAKEFIELD